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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-110

EDMOND PFOTZER and E. JOHN PFOTZER, Individually and as co-partners doing business under the firm name and style of E. & E. J. Pfotzer,

Petitioners,

vs.

DORR-OLIVER, INC., DONALD J. ST. JOHN, MICHAEL WARHOLIC, and THE CITY OF NORWALK,

Respondents.

BRIEF IN OPPOSITION FOR A PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR J. GOLDBLATT
Corporation Counsel
City Hall, P. O. Box 798
South Norwalk, Connecticut 06856

Attorney for City of Norwalk

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vs.

Dorr-Oliver, Inc., Donald J. St. John, Michael Warholic, and The City of Norwalk,

Respondents.

BRIEF OF RESPONDENT, CITY OF NORWALK

Preliminary Statement

This is an appeal from a final judgment of dismissal by the District Court of a complaint requesting declaratory judgment and injunction by means of a three-judge court.

Statement of Issue

Did United States District Court Judge Jon O. Newman either lack jurisdiction or exceed his authority in dismissing Appellants' complaint requesting a three-judge court.

Statement of Case

1. Dorr-Oliver Incorporated (Appellee) instituted a lawsuit against E. and E. J. Pfotzer (Appellants) in the Superior Court of the State of Connecticut at Stamford, for collection of a balance due and owing on a sales contract, by prejudgment garnishment (November 30, 1971) in accordance with Connecticut General Statute 52-329.

2. On September 1, 1972, E. and E. John Pfotzer instituted suit in the United States District Court for the District of Connecticut, pursuant to Title 42 U.S.C. 1983 for declaratory judgment and injunctive relief under Title 28 U.S.C. §§ 2201 and 2202 to declare Sections 52-279, 52-280, 52-281 and 52-304 of the Connecticut General Statutes unconstitutional and to restrain their enforcement. A three-judge District Court pursuant to Title 28 U.S.C. §§ 2281 and 2284 was requested (Appellants' Appendix 25a ff.).

3. On October 4, 1972, Dorr-Oliver Incorporated moved, under Connecticut General Statute 52-281, to substitute the prejudgment garnishment, and after notice and hearing, October 26, 1972, before Judge Tierny of the Superior Court (at which E. John Pfotzer and Counsel for the garnishee City of Norwalk attended and argued), the motion was granted, the original garnishment release and another garnishment entered (Appellants' Appendix 24 a. ff.).

4. On October 31, 1972, E. and E. J. Pfotzer amended their U.S.D.C. complaint alleging that the hearing on said motion to substitute garnishment did not constitute a hearing upon the merits of the State Court complaint (Appellants' Appendix 16 a ff.).

5. On November 8, 1972 Dorr-Oliver Incorporated moved to dismiss the U.S.D.C. complaint for the reason that the basis of the complaint no longer existed because of the release of the prejudgment garnishment and entering of another garnishment, subsequent thereto (Appellants' Appendix 41 a). E. and E. John Pfotzer filed an affidavit in opposition to the Motion to Dismiss stating that there was no "hearing" and that the second garnishment was a continuation of the first garnishment (Appellants' Appendix 49 a ff.).

6. On November 15, 1972, District Court Judge Jon O. Newman denied E. and J. Pfotzer's motion for preliminary injunction and ordered this matter and others stayed, pending decision of the court in *Lynch* v. *Household Finance Corporation* (Appellants' Appendix 13 a).

7. On January 23, 1973, Dorr Oliver Inc. reclaimed their Motion to Dismiss (Appellants' Appendix 41 a).

8. On May 11, 1973, United States District Judge Jon O. Newman granted Dorr-Oliver Incorporated Motion to dismiss and entered Judgment May 25, 1973 (Appellants' Appendix 5 a. ff.).

9. After appeal was docketed in the United States Circuit Court of Appeals, E. and E. J. Pfotzer asked the United States District Court for permission to reargue the Motion to Dismiss which was denied June 25, 1973.

10. E. and E. John Pfotzer applied to the United States Supreme Court for leave to file petition for writ of mandamus and/or prohibition, which was denied.

ARGUMENT

I.

The question before the District Court was whether a three-judge court was required.

We are concerned here with Title 28 U.S.C. § 2281—Injunction against enforcement of State statute; three-judge court required, and, Title 28 U.S.C. § 2283—Stay of State court proceedings.

It is not disputed that an injunction restraining the enforcement, operation or execution of a State statute shall not be granted by any district court or judge upon the ground of the unconstitutionality of such statute, but rather must be heard by a district court of three judges.

Although an application may be filed for and a three-judge court claimed, an initial determination must be made by the district court judge as to whether or not the claim for a three-judge court is in fact proper. The U.S. Supreme Court, in *Idlewild Liquor Corp.* v. *Epstein* (1962), 370 U.S. 713, has stated:

> "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." (page 715)

Initially, appellants' complaint in the district court requested a declaratory judgment and injunctive relief rela-

tive to Connecticut General Statute § 52-329, which was the authority under which the appellee—Dorr-Oliver Incorporated—obtained garnishment of funds belonging to the non-resident appellants. Section 52-329 was the sole and only Connecticut statute which the appellee used in order to obtain the first garnishment.

At that point in time, the question as to the constitutionality of Section 52-329 had not been reviewed or decided by the Federal Courts. The appellants then correctly presented the question to the district court for review and consideration of the constitutional question. The appellees concede that at that point in time a substantial federal question existed and that a basis for a three-judge court probably existed. If the district court judge at that point had dismissed the complaint, the appellants' present argument would be valid and controlling. The district court judge, however, did not dismiss, but did order a stay of proceeding pending determination by a three-judge court which was considering the constitutionality of Connecticut's prejudgment attachment and garnishment statute, Connecticut General Statutes § 52-329 in *Lynch* v. *Household Finance Corporation* (Appellants' Appendix 13a. ff.).

Prior to the district court ordering a stay of proceedings, Dorr-Oliver Incorporated (Appellee) moved—in the State Supreme Court under Connecticut General Statute 52-281 and on the basis that "Recent decisions rendered in the United States District Court . . . have raised questions as to whether prejudgment garnishment statutes, similar to the Connecticut General Statutes, violate the due process clause of the Fourteenth Amendment of the Constitution of the United States by failing to provide notice and an opportunity for hearing prior to the making of garnishment" for a substitute garnishment "in an

amount equal to the amount presently garnished, $22,715.00, subject to and contingent upon the plaintiff release of the present garnishment as it relates to the City of Norwalk and Transamerica Insurance Company" (Appellants' Appendix 84a ff.)

The State Superior court granted Dorr-Oliver's (Appellees') motion for a second garnishment contingent upon release of the first garnishment in accordance with Connecticut General Statute 52-281. The first garnishment, which was obtained under Connecticut General Statute 52-329, was released November 2, 1972 (Appellants' Appendix 88a), and the second garnishment under Connecticut General Statute 52-281 served immediately upon release of the first garnishment.

E. and E. John Pfotzer, again prior to the stay of proceedings, filed an amended complaint (Appellants' Appendix 16a ff.) alleging the second garnishment and claiming that the attendance at court before Judge Tierny and oral and written argument in opposition to its granting and response to Judge Tierny's questions by counsel for Dorr-Oliver, counsel for the City of Norwalk (garnishee), and E. John Pfotzer did not constitute a "hearing" upon the merits of the claims of the parties, and that the procedure violated their constitutional rights. It is further claimed by the appellee that the second garnishment was a continuation of the first garnishment and therefore void.

"15. The 'substitute garnishment' merely replaced the original garnishment"

"25. Defendant still continues the deprivation of plaintiffs' funds commenced by the illegal garnishment under void Sec. 52-329" (Appellants' Appendix 62a ff.)

After the release of the first garnishment (§ 52-329) and the filing of the second garnishment (§ 52-281), Dorr-Oliver Incorporated moved to dismiss the complaint in the district court on the basis that the garnishment attacked therein, the first garnishment, no longer existed and therefore was no longer subject to review and consideration. It was at this point that the stay of proceeding was ordered.

Up to the point where the first garnishment was released, the appellees concede that there was probably a substantial federal question involved which would have required a determination by a three-judge court. At the point in time when the stay in proceedings was ordered, the questions before the court were whether the first garnishment under § 52-329 was violative of the constitutional rights of E. and E. J. Pfotzer (appellants) and whether the release of the first garnishment and imposition of the second or substitute garnishment was with a hearing or was without a hearing.

The three-judge court in *Lynch* v. *Household Finance Corporation* (1972) 405 U.S. 538, on remand (D. C. Conn. 1973) —— F.S. ——, decided that Connecticut General Statute 52-329 was unconstitutional.

Upon the rendering of the decision by the three-judge court in *Lynch* v. *Household Finance Corporation*, the question presented to the district court by E. and E. J. Pfotzer as to the constitutionality of said statute became moot, having already been decided, and the constitutional question thereby presented was no longer of substance. Clearly, an attachment or garnishment under section 52-329 of the Connecticut General Statutes was unconstitutional.

If it were not for the fact that the first garnishment (52-329) was released and the second garnishment ordered

(52-281) prior to the decision of the *Lynch* case, E. and E. J. Pfotzer would be correct in their argument and the first garnishment would have to be released as unconstitutional. With the second garnishment, the court was required to decide whether E. and E. J. Pfotzer's claim required a three-judge court and thereby whether the constitutional question raised was substantial; whether the complaint alleged a basis for equitable relief and whether the case otherwise presented the requirements of a three-judge court.

The basis upon which the district court was required to make its determination was upon the pleadings presented.

Santiago v. *Corporacion de Renovacion Urbana Y Vivienda Puerto Rico, C.A. Puerto Rico* (1972), 543 F.2d 794.

II.

Appellants' federal suit sought a determination of constitutionality of a decision reached in a pending state suit.

At the time the district court considered and granted dismissal of the district court suit, Judge Newman had before him as part of the pleadings of E. and E. J. Pfotzer the initial complaint (Appellants' Appendix 25a), the amended complaint, together with exhibits thereto (Appellants' Appendix 16a), Affidavit in support of a motion for preliminary injunction (Appellants' Appendix 33a); Affidavit in opposition to dismissal motion (Appellants' Appendix 49a) with exhibit, objection to motion for substitute garnishment (Appellants' Appendix 55a); statement in support of summary judgment motion (Appellants' Appendix 62a) and Affidavit in support of cross-motion to vacate stay, convene statutory three-judge court to act herein,

renew motion for temporary injunctive relief, to designate plaintiff as numbers of class *infra*, for summary judgment, and in opposition to defendant's motion to dismiss (Appellants' Appendix 67a) together with *information obtained* during oral arguments.

In the "First Amended Complaint" it is alleged:

"21. On October 26, 1972, and following the hearing of a motion by plaintiff for a preliminary injunction in this action upon October 16, 1972, the motion of defendant herein for a 'Substitute Garnishment' came on to be heard before the Superior Court of the State of Connecticut, Fairfield County, Tierny, *J.*, and upon hearing the parties, the said motion ("Exhibit B") was granted.

"22. The hearing of the said motion for a 'Substitute Garnishment' did not constitute a hearing upon the merits of the alleged claim against these plaintiffs of the defendant Dorr-Oliver Inc., or upon the alleged defenses and counter-claim etc. to said alleged claim and no evidence was presented to the Superior Court as to the claimed necessity of such 'Substitute Garnishment'.

"23. These plaintiffs have been denied the equal protection of the laws of the State of Connecticut in that their property has been seized, upon a writ of attachment issued by a private party, defendant Howard Dean, Esq., and upon a 'Substitute Garnishment' with no opportunity for a Court hearing upon the merits of the allegations of the proposed complaint, with no opportunity for a hearing, such as was required upon plaintiffs' application to the Court for an order of attachment, in aid of counter-claim as relating to Dorr-Oliver's ability

> to pay any prospective judgment in favor of these plaintiffs, and with no procedure available to them in the Courts of the State of Connecticut to question or attack the said writ of attachment." (Appellants' Appendix 22a, 23a)
>
> (It should be noted that although Howard Dean, Esq. is referred to as a defendant he was in fact never served with process.)

In the prayer for relief the First Amended Complaint, among other requests, requested an injunction restraining the defendants (Appellees herein) from enforcing the attachment served "under the color of the authority of Sections 52-279, 52-280, 52-304 and 52-329 of the Connecticut General Statutes, and from enforcing a 'Substitute Writ of Garnishment' issued by the Clerk of the Superior Court of the State of Connecticut, Fairfield County (paragraph 21, supra) . . ." (Appellants' Appendix 24a).

The Court's attention is directed further to paragraph 4 of the Affidavit in opposition to the motion to dismiss (Appellants' Appendix 51a); paragraph I, page 2 of objection to motion for substitute garnishment (Appellants' Appendix 56a); paragraphs 15 and 24, statement in support of summary judgment motion (Appellants' Appendix 64a, 65a); and paragraphs 9 and 10, Affidavit in support of cross-motions, etc. (Appellants' Appendix 69a) as further indications, in the pleadings that the federal suit sought a determination of the constitutionality of a decision reached in a pending state suit, namely that the state court hearing that preceded the granting of Dorr-Oliver's motion for a second garnishment was constitutionally deficient.

It should be noted that the prayer for relief in the First Amended Complaint, and the only amended complaint in

the district court action, does not include a specific reference to Connecticut General Statute 52-281.

The district court was therefore presented an issue, on the basis of the pleadings presented, to which the court could not affirmatively respond because of the restriction that a court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment (Title 28, U.S.C. §2283, c646, 62 Stat. 968).

The prohibition of § 2283 is against a stay of "proceedings in a State Court". That term is comprehensive. "It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process."

Hill v. *Martin*, 296 U.S. 393 (1935).

As stated previously if it were not for the fact that the first garnishment was released and the second garnishment filed prior to the rendering of the decision in the *Lynch* case the Appellants' argument relative to section 52-329 would prevail and the district court, under the logic of the *Lynch* decision, would have had the authority and the jurisdiction to enjoin all actions with respect to 52-329. Referring to section 52-329 the *Lynch* court stated:

> "But the garnishment was, in this case, an action taken by private parties who were not proceeding under a court's supervision and who were using, as agents, state officials who were themselves not acting pursuant to a court order or under a court's authority."
>
> *Lynch* v. *Household Finance Corporation*, 450 U.S. 538, 554, 555 (1972).

The pleadings presented to the district court included the motion to dismiss (Appellants' Appendix 41a-48a) and the pleadings submitted in the State court proceeding relative to the release of the first garnishment and granting of the second or subsequent garnishment. The granting of the second garnishment under authority of Connecticut General Statute 52-281 was not an action taken by a private party without court supervision and the actions of counsel for Dorr-Oliver Incorporated and the service of the second garnishment by the sheriff were not actions taken without the court's authority. If the district court were to have acted as E. and E. J. Pfotzer has asked the court to act, to determine that the proceedings in the State court for release of the first garnishment and granting of the second garnishment did not comply with the Lynch decision, then the district court would have been violating the prohibition of section 2283.

The Supreme Court in *Mitchum* v. *Foster*, 407 U.S. 225, 92 S.Ct. 2151 (1972), concluded that section 1983 is an Act of Congress that falls within the "expressly authorized" exception of that law. The Court stated at page 2162:

> "In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding."

The decision in *Mitchum* was only that the District Court in that case was in error in holding that, because of the anti-injunction statute, it was absolutely without power under section 1983 to enjoin a pending proceeding in a state court under any circumstances whatsoever.

Previously in *Younger* v. *Harris*, 401 U.S. 37 (1971), the Supreme Court stated:

> "The precise reason for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied relief." (page 43)

and,

> "This brief discussion should be enough to suggest some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." (page 45)

and,

> "In all of these cases the Court stresses the importance of showing irreparable injury, the traditional prerequisite to obtaining an injunction. In addition, however, the Court also made clear that in view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is 'both great and immediate'." (page 46)

The *Lynch* decision recognized the *Younger* and companion case decisions and stated:

> "Of course, those case involved federal injunctions against state criminal proceedings, but the relevant considerations, in my view, are equally applicable

where state civil litigation is in progress, as is here the case."

(*Lynch* v. *Household Finance Corporation*, 405 U.S. 538, 561).

Therefore, upon the facts presented the exception to the prohibition of 2283 does not appear applicable and federal court intervention to review the sufficiency of a hearing in a pending state court litigation is unwarranted.

III.

No irreparable harm.

On the issue of irreparable injury, E. and E. J. Pfotzer alleged in First Amended Complaint that they have been deprived of the use of the money under attachment ($22,175.00) "and have been unable to use it in the procurement of business which is the sole source of their income and livelihood, and relatedly have been unable to use it in their construction contracts because their ability to furnish bid bonds and performance and payment bonds has been greatly impaired". (First Amended Complaint, paragraph 15, Appellants' Appendix 20 a).

E. and E. J. Pfotzer further alleged that the monies attached were a portion of monies owing to E. and E. J. Pfotzer from a contract and from a judgment recovered against the City of Norwalk. (Paragraph 14, First Amended Complaint, Appellants' Appendix 19 a, 20 a). E. and E. J. Pfotzer had obtained a judgment against the City of Norwalk and others for the sum of $246,788.10. (Affidavit in Support of Motion for an Order Granting a Preliminary Injunction, paragraphs 2, 3, Appellants' Appendix 76 a). E. and E. J. Pfotzer further stated to the district court by Affidavit in Support of Motion for an

Order Granting a Preliminary Injunction, at paragraph 12, that the withholding of $22,175.00 "greatly hindered them" (Appellants' Appendix 78 a).

A hindrance does not constitute irreparable harm.

On the basis of the pleadings presented to the district court, there was no showing of irreparable harm—either in compensable damages or violation of constitutional rights.

> "It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."
>
> *Dombrowski* v. *Pfister*, 380 U.S. 479, 484, 485 (1965).

IV.

One Judge can decide.

In accordance with the *Epstein* decision (supra), and *Abele* v. *Markle*, 425 F.2d 1121 (1971), an initial determination must be made by the district court judge as to whether or not a claim for a three-judge court is in fact proper.

At the time of dismissal, the Lynch decision had been rendered and section 52-329 of the Connecticut General Statutes was determined to be unconstitutional. This portion of E. and E. J. Pfotzer's claims before the district court had therefore been decided. The amended complaint of E. and E. J. Pfotzer alleged the state court proceeding under section 52-281 and attempted by alleging a continuation of the first garnishment by means of the state court proceedings into the second garnishment.

"4. Plaintiffs seek an injunction and declaratory judgment (Title 28 U.S.C. §§ 2201 and 2202) restraining the enforcement of a garnishment of their property and declaring that Sections 52-279, 52-280, 52-281 and 52-304 of the Connecticut General Statutes are unconstitutional on their face, and *as applied and used* by the defendants, upon the grounds that the said statutes and *their specific application by the defendants* against the plaintiff herein have deprived plaintiff of the equal protection of the laws and due process of law as guaranteed to them by the Fourteenth Amendment to the United States Constitution." (Emphasis added) (First Amended Complaint, paragraph 4, Appellants' Appendix 17 a).

It should be noted that the amended complaint deletes reference to section 52-329 in paragraph 4 of the complaint but does not contain a reference to it in the Prayer for Relief paragraph 3. It should be noted further that although reference is made in the amended complaint to section 52-279, 52-280 and 52-304 of the Connecticut General Statute, no argument has been made by the Appellants herein, and it is assumed that all arguments relative thereto are waived by the Appellants.

As stated previously E. and E. J. Pfotzer stated at paragraph 24 of Plaintiffs' Statement in Support of Summary Judgment Motion:

"24. Defendants' use of Sec. 52 281 to replace for Sec. 52-329 garnishment is a continuing or further action under Sec. 52-329 enjoined by this Court in *Lynch*." (Appellants' Appendix 65 a).

The argument of E. and E. J. Pfotzer, Appellants herein at page 15 of their brief that the district court

"disregarded the main thrust of plaintiffs' amended complaint" is not supported by the pleadings presented to the district court by E. and E. J. Pfotzer. The district court therefore had before it at the time of dismissal the claim of E. and E. J. Pfotzer attacking the validity of the hearing before the State court prior to the granting of the second garnishment, which procedure is a state court proceeding which the district court is provisionally restricted from enjoining.

By the authority and jurisdiction granted to the district court under the *Epstein* and *Abele* decisions, the district court determined that a three-judge court was not required, and correctly dismissed the complaint.

> "We therefore hold that, in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well."
>
> *Samuels* v. *Mackell*, 401 U.S. 66, 73 (1971).

The reasoning and arguments as presented to the Court above are presented as equally applicable to the question of injunction and the question of declaratory judgment.

V.

The 52-329 garnishment was not void ab initio.

The appellants argue (Appellants' Brief page 19) that the first garnishment under 52-329 was void ab initio, and that the second garnishment under 52-281 was obtained in violation of their constitutional rights and therefore invalid. In consequence thereof, the withholding of the funds under the garnishment is without lawful authorization.

The appellants do not present judicial or statutory authority in support of their contention. The appellees are not aware of any controlling judicial or statutory authority in support of appellants' argument.

The issue of the constitutionality of Connecticut General Statute 52-329 was not presented to the federal court prior to the *Lynch* decision. A federal court cannot pronounce any statute, either of a State or of the United States, void because it is irreconcilable with the Constitution of the United States of America, except as it is called upon to adjudge the legal rights of litigants in actual controversy. *Baker* v. *Carr*, 206 F.Supp. 341; *Golden* v. *Zwickler*, 394 U.S. 103. The court was not called upon to make such a decision until the *Lynch* case. The *Lynch* decision did not state that Connecticut General Statute 52-329 or any action taken in reliance upon its validity was and were void ab initio.

The appellees herein obtained the first garnishment under a statute valid at the time they acted, prior to the *Lynch* decision. The appellees herein released the first garnishment prior to the *Lynch* decision. The appellees herein requested the State court for the second or substitute garnishment on the basis that:

"4. Recent decisions rendered in the United States District Courts . . . have raised questions as to whether prejudgment garnishment statutes, similar to the Connecticut General Statutes, violate the due process clause of the Fourteenth Amendment of Constitution of the United States by failing to provide notice and an opportunity for hearing prior to the making of garnishment."

(Motion for Substitute Garnishment, Appellants' Appendix 24a(4)).

The second garnishment was ordered prior to the *Lynch* decision. The first garnishment was obtained under a statute valid at the time and the second garnishment was obtained under a court order validly requested and validly obtained. All prior to the *Lynch* decision.

The appellees herein would point out further that the Memorandum of Decision on Civil Action No. 13,737, rendered January 2, 1973 by Circuit Judge Anderson, referred to herein as the *Lynch* decision, stated that the plaintiff therein represents a class of people "who are subject to Connecticut in personam jurisdiction". E. and E. J. Pfotzer in their complaint and "First Amended Complaint", at paragraph 5, allege that Edmond Pfotzer is a citizen and resident of the State of Vermont and that E. John Pfotzer is a citizen and resident of the State of Delaware (Appellants' Appendix 17a). Therefore, there is a question as to whether the *Lynch* decision (1973) would in fact have been applicable to them as non-residents of the State of Connecticut as persons who are "subject to Connecticut in personam jurisdiction".

Section 52-329 was not void ab initio and, in fact, may not be void even now with respect to non-residents not subject to in personam jurisdiction of the State court.

VI.

No damages should be awarded.

The file in this case indicates that on August 26, 1974, the Petitioner, E. John Pfotzer, advised the Clerk of this Court that the parties, Dorr-Oliver, Inc., Howard Dean, Esq., and Donald J. St. John, Esq., had no further interest in this matter. The City, therefore, remains the only Respondent and as to it only the matter of damages is at issue.

As the City acted, with respect to the first garnishment, upon the belief that it was valid under the then existing law, it is difficult to establish in what way it is liable to Petitioners in damages.

The second garnishment was ordered prior to the *Lynch* decision and after a hearing in the state court in the matter of *Dorr-Oliver, Incorporated* v. *Edmond Pfotzer, et als*, and as *Lynch* did not prescribe the exact procedures required to take a garnishment from within its holding, the City likewise was entitled, in good faith, to rely upon said second garnishment.

As the United States District Judge said in his opinion [Appellants Appendix 6a]:

> "In addition to their claim for injunctive relief, plaintiffs seek damages, but this claim also warrants dismissal. Even if plaintiffs prevailed on the merits of their attack on both garnishments, damages would not be awarded. The defendants obtained the first garnishment under a statute valid at the time they acted, and any infirmity in the second garnishment stems from the alleged inadequacy of the hearing in the state court. Even if the hearing was deficient,

defendants would in no event have to respond in damages for acting in good faith upon a court order they believed they had validly obtained."

It is submitted that this statement is a proper rule with respect to the claim for damages still outstanding in the pleadings in this matter.

CONCLUSION

The judgment of dismissal by the federal district court was not without jurisdiction or authority to do so. The federal district court acted in accordance with sound judicial logic within the confines and limitations of its jurisdiction and authority.

WHEREFORE, the Respondent City respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

By .....

ARTHUR J. GOLDBLATT
Corporation Counsel
City Hall, P. O. Box 798
South Norwalk, Connecticut 06856

Attorney for City of Norwalk

Certificate of Service

I hereby certify that all parties required to be served have been served and that on this 15th day of November, 1974, I forwarded by U. S. mail, postage prepaid, three copies of the foregoing Brief to the following: Mr. E. John Pfotzer, P. O. Box 987, Wilmington, Delaware 19899.

.....

ARTHUR J. GOLDBLATT